

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

_____)	
Complaint of Metricom, Inc.)	
Pursuant to G.L. c. 166, § 25A and)	
220 C.M.R. § 45.00, et seq., Regarding)	D.T.E. 01-40
Access to Poles Owned or Controlled))	
By Boston Edison Company)	
_____)	

OPPOSITION OF THE MASSACHUSETTS MUNICIPAL LIGHT PLANTS
TO MOTION OF METRICOM FOR PROTECTIVE ORDER

Pursuant to 220 C.M.R. 1.04(5), the intervenor Massachusetts Municipal Light Plants (“MMLPs”) hereby oppose, in part, Metricom’s request for protective order filed with the Department of Telecommunications and Energy (“DTE”) on June 26, 2001. Specifically, the MMLPs oppose Metricom’s motion to the extent that it seeks to prevent public disclosure of any and all terms of any pole attachment agreements that Metricom has negotiated with other municipal light departments in Massachusetts.¹ As set forth below, those documents in their entirety are public records and therefore there is no basis for redacting any information alleged by Metricom to be “competitively sensitive.” That information is already part of the public record.

In support of its opposition, the MMLPs state as follows:

1. Any executed pole attachment between Metricom and any municipal light department in Massachusetts is considered a “public record” within the meaning of G.L. c. 66, § 10.

¹ The MMLPs take no position on the other items for which Metricom seeks protective treatment not specifically discussed herein.

2. The public records statute, G.L. c. 66, § 10, grants the public access to various records and documents in the possession of public officials. The statute provides, in relevant part: “[e]very person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter 4, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee.”

3. A municipal light plant falls within the defined agencies for responding to requests for public records -- it is an "agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof." G.L. c. 4, § 7, cl. 26; see also 950 CMR 32.03 (definition of “governmental entity”). Metricom falls within the statute’s definition of “person,” which includes corporations, societies, associations and partnerships. G.L. c. 4, § 7, cl. 23. Metricom is therefore a person in possession of public records – e.g., executed pole attachment agreements with the municipal light departments of Belmont and Wakefield.

4. G.L. c. 4, § 7 defines the term “public records” as: “Books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth or any political subdivision thereof... unless such materials or data fall within the following exemptions...” G.L. c. 4, § 7, cl. 26 [emphasis added.]

5. Exceptions to the rule requiring production of public documents include:

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall

not apply to information submitted as required by law or as a condition of receiving a governmental contract or benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person.

G.L. c. 4, § 7, cl. 26 [emphasis added.] The other exceptions to the public records law

plainly are not applicable here. See id.

6. Information that has been redacted from Metricom's information request responses to the DTE includes rates paid by Metricom for power to its radio devices. Rates paid for electricity by a municipal light department customer clearly do not fall within any of the enumerated exceptions to the public records law. Municipal light department rates for electricity *paid by any* customer are by statute based on cost of plant (and therefore part of a municipal light plant's annual budget) and therefore a matter of public record. See, e.g., G.L. c. 164, §§ 57, 58 and 63. There is no defensible basis for redacting such information because it is already considered part of the "public record."

7. Metricom has also redacted the annual rates paid by Metricom for the use of the municipal light departments' facilities. The rates that Metricom pays to municipal light departments for placing its radios on their streetlight arm brackets do not fall within the "trade secret" or "financial information" exception (g) under G.L. c. 4, § 7(g), cl. 26. First, the price which Metricom is willing to pay for placing a radio on a municipal light department-owned streetlight is hardly information to be used in developing "a governmental policy." (Even if it were, and it strains credulity to call a contract a "governmental policy," the so-called "policy" is past the development stage; it has been implemented in the form of an executed contract. Obviously, Metricom had to inform the municipal light departments it

was negotiating with what it would agree to pay for access to the streetlights, otherwise there would be no agreement, and Metricom would be unable to gain any access.)

8. Second, in order for Metricom to receive a benefit, i.e., access to the streetlights, it would have to provide information on how much it would pay to the municipal light departments. Thus, providing the information was necessary for Metricom to receive a benefit, as set forth under G.L. c. 4, § 7, cl. 26. (This argument again assumes some governmental policy is being developed, and the MMLPs submit that negotiation of a pole attachment agreement, and implementation of that agreement, is in fact not “governmental policy.”) Accordingly, the rates paid by Metricom to municipal light departments under executed pole attachment agreements are public records which are not exempt from disclosure under G.L. c. 66, § 10.

9. Metricom’s attempt to shield the rates it pays for its radios to be placed on streetlights is particularly disingenuous in light of the fact that Metricom seeks, through this proceeding, to force utilities, including municipal light plants, to follow the provisions of G.L. c. 166, § 25A regarding the placement of those radios on streetlight brackets. If Metricom in fact were a telecommunications company covered by G.L. c. 166, then it would have no concerns about “negotiating” pole attachment agreements in the future; they would all be quite similar and subject to uniform rate formulas under Section 25A and 220 C.M.R. 45.00.

10. Finally, Metricom’s Wakefield and Belmont agreements both contain “most favored nations” clauses, which means that any municipal light department negotiating an agreement with Metricom would be entitled to the very same allegedly competitively sensitive rates as those municipal light departments with executed agreements.

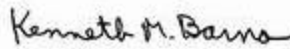
11. In conclusion, because any citizen could, pursuant to a public records request, request and lawfully receive any executed copy of a pole attachment agreement between Metricom and any municipal light department, there is absolutely no basis for requesting protection from public disclosure of these particular agreements.

CONCLUSION

For the foregoing reasons, Metricom's request for protective treatment of the information contained in the executed pole attachment agreements with Belmont and Wakefield should be denied, and Metricom should be required to produce the redacted information.

Respectfully submitted,

MASSACHUSETTS MUNICIPAL LIGHT
PLANTS



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